

BOARD OF APPEALS CASE NO. 5522

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BEFORE THE

APPLICANTS: Milton & Jean Gholston

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ZONING HEARING EXAMINER

REQUEST: Variance to permit an addition
within the required 35 foot rear yard setback
in the R3 District

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OF HARFORD COUNTY

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HEARING DATE: November 6, 2006

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ZONING HEARING EXAMINER'S DECISION

The Applicants, Milton Gholston, Jr., and Jean S. Watson Gholston, are requesting a variance, pursuant to Section 267-36B, Table V, of the Harford County Code, to permit an addition to encroach the 35 foot rear yard setback (31 foot proposed) in the R3 District.

The subject property is located at 313 Joppa Crossing Way, Joppa, Maryland 21085, in the First Election District, and is more particularly identified on Tax Map 64, Grid 3F, Parcel 0162, Lot 104. The parcel contains approximately 6,751 square feet.

PROCEDURAL HISTORY

The case initially came for hearing before the Hearing Examiner on February 22, 2006. The Hearing Examiner issued a decision recommending denial of the requested variance on March 24, 2006. That decision was based on the Applicant's failure to prove that there was anything unique about his property from a zoning perspective. The Applicant sought timely review of the Hearing Examiner's decision by the Harford County Council sitting as the Board of Appeals. After argument on September 5, 2006, the Board remanded the case to the Hearing Examiner "for further testimony and receipt of any documents regarding permits and approvals received by the Applicant from the Department of Planning and Zoning, and whether these have any effect on the recommendation to deny the requested variance." The case was reset before the Hearing Examiner for November 6, 2006.

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TESTIMONY OF WITNESSES/FINDINGS OF FACT

Mr. Milton Gholston, Jr., appeared at the remand hearing and testified that he did not have the permit or drawings of the proposed sunroom with him at the original hearing because he had previously given them to the Department of Planning and Zoning. The Applicant testified that he obtained two separate permits prior to beginning construction of the structure in question. The first permit was to build a deck on the rear of his house, which he began but never completed. That structure is not relevant to the subject Application. The second permit was to construct the sunroom at issue. Mr. Gholston indicated that he intended to begin construction of that structure by building a screened in porch. Then, after obtaining the required variance, he planned to convert the screen room into a sunroom. According to the witness, he applied for the permit to construct the screened in porch at the same time as he applied for the variance. He indicated that the Department of Planning and Zoning advised him when he filed the permit application that he could build a screen room without obtaining a variance, but that he would need a variance to construct a sunroom.

The Applicant introduced the following documents in support of his contention that he obtained both a permit and prior approval to construct the sunroom in question.

1. Permit No. 2005278B0100 dated 10/05/05 authorizing construction of a screened in deck. That permit contains a special condition stating: "Cannot enclose as a sunroom-only as screened in deck" (*Applicant's Exhibit 1*)
2. Receipt for fees paid for the above-referenced building permit (*Applicant's Exhibit 2*)
3. Six month extension dated October 31, 2006 for the above referenced building permit. (*Applicant's Exhibit 3*)
4. Use and Occupancy Permit dated October 31, 2006 for the structure built by Applicants pursuant to the above-referenced permit. (*Applicant's Exhibit 4*)

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5. A Building Services Plan Review Comment Sheet from the Department of Inspections, Licenses and Permits dated October 5, 2005 referencing Permit Number 2005278B0100. That Department approved the attached building plans for a structure identified as a "Screen room for future sunroom" The plans depict the structure actually built by the Applicants on the rear of their home. (*See Applicant's Exhibit 5*).
6. Letter dated November 2, 2006 from Harford County Chief of Building Services Division advising Applicant that he had failed to timely obtain the inspections the necessary to obtain Use and Occupancy of the subject addition. (*Applicant's Exhibit 6*)

No witnesses or testimony was presented in opposition to the request.

Mr. Gholston correctly points out that the building plans attached to Applicants Exhibit 5, match the structure which he eventually constructed on the subject parcel. The plans for that structure were approved by the Department of Inspections Licenses and Permits based on the 2000 International Residential Code adopted by Local Bill 01-38. If the Applicants had not needed a setback variance in order to construct the sunroom at its present location, or if they had obtained a variance prior to construction, the structure would be acceptable as built. However, the building permit introduced at the remand hearing as Applicants' Exhibit 1, specifically states that it is for a screened in deck only, and that the Applicants could not enclose the structure as a sunroom.

It is also important to note that although the Department of Inspections Licenses and Permits approved the Applicants' building plans for a "future" sunroom, it did not, nor was it authorized to grant him a variance to build that structure within the building setback. The power to adopt and make determinations regarding compliance with a building code does not include authority to waive building setback restrictions. In fact, the approval stamp on the back of the Building Services Plan Review states specifically that "the issuance of a building permit does not permit occupancy without compliance with all applicable codes. ... Subject to the revisions noted these plans were reviewed for compliance with the Harford County Building Code. The approval of these plans shall not be held to permit the violation of any state and local laws. ..."

Pursuant to the Harford County Code, variances must be granted by the Board of Appeals. Unfortunately, the Applicant chose to construct the subject sunroom without waiting to ascertain whether the variance requested from that Board had been granted. A sunroom of the size constructed by the Applicants could not have been built at the subject location without first obtaining a variance because the structure encroaches into the rear yard setback. There is no question that similar sunrooms and additions have been built within the Applicants' neighborhood. However, the Applicant himself indicated at the first hearing that none of those structures required variances.

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It is also undisputed that the granting of the required variance would have no adverse impact on adjacent properties. Nevertheless, none of these issues are relevant until the threshold question of whether there is anything unique about the subject property has first been answered in the affirmative.

Section 267-11 of the Harford County Code permits the granting of variances, stating:

"Variances from the provisions or requirements of this Code may be granted if the Board finds that:

- (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.

The Maryland Court of Special Appeals set forth a two prong test for determining whether a variance should be granted in the case of *Cromwell v. Ward*, 102 Md. App. 691, 651 A. 2d 424 (1995). This test can be summarized as follows. First, there must be a determination as to whether there is anything unique about the property for which the variance is being requested. A lot is unique if a peculiar characteristic or unusual circumstance, relating only to that property, causes the zoning ordinance to impact more severely on the property than on surrounding parcels. *Cromwell, supra*, at 721. Only if the subject property is unique, may the hearing examiner proceed to the second prong of the test. That prong involves a determination as to whether literal enforcement of the zoning ordinance, with regard to the unique property, would result in practical difficulty or unreasonable hardship to the property owner.

As stated in the Zoning Hearing Examiner's original Decision:

"In the zoning context, the unique aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. Uniqueness of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls. *North v. St. Mary's County*, 99 Md. App. 502, 512, 638 A.2d 1175 (1994)

The Staff Report does indicate that the subject property slopes sharply downward from the house toward the rear property line. However, the slope of the subject parcel is no different than the slope found on other properties in the neighborhood. In fact, a review of the photographs designated as Staff Report Attachments 8B and 8 D clearly shows that all other properties in the immediate vicinity of the subject parcel have similarly sloping rear yards.

In addition, even if they did not, the sloping rear yard did not impact the placement

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of the addition constructed by the Applicants in this case. For the reasons set forth above, the Hearing Examiner concurs with the Department of Planning and Zoning, that the subject property is not unique as that word is intended within the context of zoning law.”

CONCLUSION:

The mere fact that the Applicants' building plans were approved did not authorize them to build a sunroom within the rear yard setback without first obtaining a variance. None of the documents introduced by the Applicants at the remand hearing contradict the prior determination that the subject property is not unique. Without such a finding, the Hearing Examiner can not recommend a setback variance for the subject property.

The Hearing Examiner, therefore, recommends that the subject Application be denied.

Date FEBRUARY 15, 2007

REBECCA A. BRYANT
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on MARCH 16, 2007.